

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
)	
)	
vs.)	No. SC 85958
)	
JERRY L. KEIGHTLEY,)	
)	
)	
Appellant.)	

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF WEBSTER COUNTY, MISSOURI
THIRTIETH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE JOHN W. SIMS, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement contained on page 7 of Appellant's Opening Substitute Brief is incorporated here by reference.

STATEMENT OF FACTS

The Statement of Facts contained on pages 8 through 18 of Appellant's Opening Substitute Brief is incorporated here by reference.

POINTS RELIED ON

I.

The trial court erred in overruling Appellant's motion to dismiss which alleged that the State acted in bad faith in entering a *nolle prosequi* after the trial court ruled that the State's DNA evidence was inadmissible under *Frye* and then refiling the same charges in order to get another judge, or, in the alternative, in failing to find that relitigation of the *Frye* hearing was barred by collateral estoppel because those rulings were fundamentally unfair, violating Appellant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Missouri Constitution in that they permitted the prosecution to forum shop without limitation for a favorable ruling on an important evidentiary issue in the case when Appellant has no corresponding right to do so.

Moran v. Clarke, 296 F.3d 638 (8th Cir. 2002);

State v. Beck, 745 S.W.2d 205 (Mo.App., E.D. 1987);

State v. Ericksen, 94 N.M. 128, 607 P.2d 666 (N.M. App. 1980);

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970);

U.S. Const. Amends. XIV;

Mo. Const. Article I, Section 10;

7.506(A) NMRA 1999.

II.

The trial court erred in denying Appellant's motion for judgment of acquittal on Count II, statutory sodomy committed by Appellant placing his penis in the mouth of Dawn Zepeda, in accepting the jury's guilty verdict on that count and in sentencing Appellant on that count because there was insufficient evidence to prove his guilt beyond a reasonable doubt as required by the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Dawn Zepeda's testimony on that issue was so contradictory that it could not be relied on and without corroboration, leaves the mind clouded with doubt concerning Appellant's guilt of that offense.

State v. Patterson, 806 S.W.2d 520 (Mo.App., S.D. 1991);

State v. Tomlin, 864 S.W.2d 364 (Mo.App., E.D. 1993);

U.S. Const. Amend. XIV;

Mo. Const. Article I, Section 10; and

Sections. 491.074 and 491.075.

III.

The trial court abused its discretion in granting the State's Motion for Pretrial Ruling on the General Acceptance and Admissibility of PCR-STR DNA Testing Technology and Brief in Support Thereof and denying Appellant's Motion to Determine Admissibility of Novel Scientific Evidence and Request for a *Frye* Hearing and in admitting the State's DNA evidence without first holding an evidentiary hearing pursuant to *Frye* because those rulings denied Appellant's right to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution in that the Appellant was denied the opportunity to prove that the new DNA technology, STR is not generally accepted in the scientific community because the primer sequence of the test kits used, Profiler Plus and COfiler, have not been released to the scientific community for peer review and verification of the validity of the method to produce reliable results

State v. Smith, 944 S.W.2d 901 (Mo.banc), *cert. denied* 522 U.S. 954

(1997);

Frye v. U.S., 293 F. 1013 (D.C. Cir 1923);

U.S. Const. Amends. VI and XIV;

Mo. Const. Article I, Sections 10 and 18(a).

ARGUMENT

I.

The trial court erred in overruling Appellant’s motion to dismiss which alleged that the State acted in bad faith in entering a *nolle prosequi* after the trial court ruled that the State’s DNA evidence was inadmissible under *Frye* and then refiling the same charges in order to get another judge, or, in the alternative, in failing to find that relitigation of the *Frye* hearing was barred by collateral estoppel because those rulings were fundamentally unfair, violating Appellant’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Missouri Constitution in that they permitted the prosecution to forum shop without limitation for a favorable ruling on an important evidentiary issue in the case when Appellant has no corresponding right to do so.

Respondent argues that Appellant’s “reliance on a generic due process argument cannot alone provide the basis for the relief he seeks.” Resp. br. at 18. Respondent then notes that Appellant mentioned a criminal defendant’s right to be tried by the trial judge and/or jury that were initially selected and approved by the both parties. Resp. br. at 19. However, it is not this right that Appellant relies on to provide the due process violation at issue here.

As noted in Appellant’s Substitute Brief, when the State acts in bad faith and by its action prejudices the Appellant, a due process violation has occurred. See Ap. br. at 27. In *Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002), the Court held

that the 14th Amendment guarantees “[s]ubstantive due process [, which] prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” *Id.* at 643, *quoting Weller v. Purkett*, 137 F.3d 1047, 1054 (8th Circ. 1998)(en banc). Therefore, the 14th Amendment prohibits “conduct that is so outrageous that it shocks the conscience or otherwise offends ‘judicial notions of fairness, [or is] offensive to human dignity.’” *Id.*

In *State v. Beck*, 745 S.W.2d 205 (Mo.App., E.D. 1987), the Eastern District held that:

The principle laid down by our Supreme Court 35 years ago in *State v. Allen*, 251 S.W.2d 659, 662, 363 Mo. 467, 473 (1952) continues to be a fundamental rule of due process today. In the trial of a criminal case, the circuit attorney occupies a quasi-judicial position. While it is his duty vigorously and fearlessly to prosecute in behalf of the State, yet he is also chargeable with the duty to see that the defendant gets a fair trial and he must not knowingly prejudice the right of the defendant to a fair trial by injecting into the case prejudice and incompetent matters.

Beck, 745 S.W.2d at 209.

Appellant has a due process right to a fair trial and that is the basis for his request for relief in this case.

Respondent believes that Appellant “minimalizes” and belittles the State’s interest in “insuring that the trial courts rule “correctly” on matters of admissibility of evidence.” Resp. br. at 20-21. Defendants also have an interest in hoping that trial courts rule correctly on admissibility of evidentiary questions. Respondent argues, “the State, as well as the defendant, is entitled to a fair trial.” Resp. br. at 21. But the defendant’s right to a fair trial is protected by the constitution, rights not shared by the State. “The constitutional guarantee of due process protects the individual from arbitrary exercise of governmental power.” *State ex rel. Amrine*, 102 S.W.3d 541, 547 (Mo.banc 2003).

In addition, it is an abuse of discretion for a prosecuting attorney to file a *nolle prosequi* because he has decided the trial court was wrong in ruling against the State on an evidentiary issue. Giving the State unfettered discretion to enter a *nolle prosequi* every time the prosecuting attorney thinks a trial court’s evidentiary ruling is wrong should offend judicial notions of fairness.

Appellant agrees with Respondent that an appeal was not available to the State. However, the State did have another option; it could have retested the DNA using reliable primers and/or another, more reliable process.

Other Jurisdictions

In a footnote, Respondent asserts that New Mexico has done away with the requirement of trial court endorsement before the State can enter a *nolle prosequi*. Resp. br. at 23 n. 8. That is incorrect. The case cited by Respondent, *State v. Gardea*, 128 N.M. 64, 989 P.2d 439 (N.M. App. 1999) deals with the application

of Metropolitan Court Rule 7.506(A) NMRA 1999 which requires a judge's endorsement before a *nolle prosequi* is effective. *Id.* at 67, 441. In *Gardea*, the State failed to get the metropolitan court's endorsement before dismissing the defendant's misdemeanor DWI and refiling felony DWI charges in district court. *Id.* The court of appeals held that by failing to obtain the requisite endorsement, the misdemeanor case was still pending. *Id.* 989 P.2d at 442.

Two other New Mexico cases are more on point. In *State v. Bolton*, 122 N.M. 831, 932 P.2d 1075 (N.M. App. 1996), the Court stated that "trial courts may and should interfere with prosecutorial discretion when prosecutors have bad reasons for their actions." *Id.* at 1078. In *State v. Ericksen*, 94 N.M. 128, 607 P.2d 666 (N.M. App. 1980), the Court upheld a trial court's dismissal with prejudice of a case the district attorney had *nolle prossed* in an attempt to get a change of judge. *Id.* 607 P.2d at 668. The trial court told the district attorney he had two choices, he could continue with the original case, or the judge would dismiss the charges with prejudice. *Id.* The district attorney argued that the trial court was without jurisdiction once the *nolle prosequi* had been entered. *Id.* In upholding the trial court's dismissal, the appellate court stated that:

We look past the form of the district attorney's usual right to file a *nolle prosequi* in any given case upon good cause and honest motives, and focus instead upon the substance of such conduct when he not only fails to demonstrate good faith, but leaves no other impression than that he

had deliberately engaged in game-playing with the rules,
and has misused his discretionary powers to achieve a
barred result.

Id. 607 P.2d at 669.

Respondent cites two Illinois cases for the proposition that the only
judicially recognized limitation to the prosecutor's power to enter a *nolle prosequi*
a finding that it was capricious or vexatiously repetitive. Resp. br. at 23, *citing*
People ex rel. Castle v. Daniels, 132 N.E.2d 507, 510 (Ill. 1956); *People v.*
Verstat, 444 N.E.2d 1374, 1384-1385 (Ill. App. 1983). However, in *People v.*
Williams, 732 N.E.2d 767 (Ill.App. 1 Dist. 2000), the Court stated that consent and
approval of the court are necessary before the State may enter a *nolle prosequi*,
and the standard in determining whether to grant approval is whether there is
evidence that the State's conduct would be capricious, vexatious, repetitious, **or**
whether it would cause substantial prejudice to the defendant. *Id.* at 775 (citations
omitted).

Respondent asserts that *Baker v. State*, 130 Md.App 281, 745 A.2d 1142
(2000) does not implicate any of the issues in this case. Resp. br. at 23 n. 9. The
issue in *Baker* was whether the 180 day speedy trial right began anew if the State
nolle prossed a case and refiled the same charges. *Id.* 745 A.2d at 1144. In
choosing the approach "that when criminal charges are *nol prossed* and later
refiled, the time period for commencing trial ordinarily begins to run anew after
the refileing," *Id.* 745 A.2d at 1145, the Court noted that "[e]ven under that third

approach, however, there is a generally recognized exception for cases ‘where the prosecution’s action is intended or clearly operates to circumvent the statute or rule prescribing a time limit for trial.’ (citation omitted). There is a requirement that the prosecution be acting in good faith.’” *Id.*

State v. Courtmarche, 142 N.H. 772, 711 A.2d 248 (N.H. banc 1998) is another case cited by Respondent as being irrelevant to the issue presented here. Resp. br. at 23 n. 9. In *Courtmarche*, the State was appealing the dismissal of its second complaint charging the defendant with DWI. *Id.* 711 A.2d at 248. The District Court had dismissed the charges on the basis of a local rule which held that jeopardy attached when a case was called for trial. *Id.* In reversing the trial court’s action, the New Hampshire Supreme Court noted the following: “The State’s discretion, however, is not unlimited, for the trial courts are empowered to curb that discretion where it is used to inflict confusion, harassment, or other unfair prejudice upon a defendant.” *Id.* 711 A.2d at 249.

Respondent cites *Commonwealth v. Pyles*, 672 N.E.2d 96 (Mass. 1996) as a case that is irrelevant to Appellant’s argument. Resp. br. at 24 n. 9. Appellant does not cite that case in his Substitute Brief.

Collateral Estoppel:

Respondent asserts that this Court should refuse to review Appellant’s alternative theory that the State is bound by Senior Judge Anderson’s ruling excluding its DNA evidence on the basis of collateral estoppel because that theory was raised for the first time in Appellant’s reply brief in the Southern District.

Resp. br. at 25-26. However, it was the State who first opened the door to the theory of collateral estoppel by relying on *State v. Maggard*, 906 S.W.2d 845, 848 (Mo.App., S.D. 1995); *State v. Beezley*, 752 S.W.2d 915, 917-18 (Mo.App., S.D. 1988); and *State v. Pippenger*, 741 S.W.2d 710, 711-712 (Mo.App., W.D. 1987). Respondent cited those cases in support of the proposition that the State may file a *nolle prosequi* even if the effect is to circumvent an adverse evidentiary ruling. Resp. original br. at 25-26.

State v. Maggard, supra; State v. Beezley, supra; and State v. Pippenger, supra, all deal with the issue of whether collateral estoppel should be applied to one court's ruling on a motion to suppress evidence after the State enters a *nolle prosequi* and refiles the same charges, creating a new case. *Maggard*, 906 S.W.2d at 848; *Beezley*, 752 S.W.2d at 917; *Pippenger*, 741 S.W.2d at 711. The State's power to enter a *nolle prosequi* was not an issue in any of those cases.

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) contains a summary of the doctrine of collateral estoppel:

Collateral estoppel is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. 397 U.S. at 443. The doctrine of collateral estoppel is recognized in Missouri. *State ex rel Hines v. Sanders*, 803 S.W.2d 649 (Mo.App., E.D. 1991). Respondent argues that there must be a final judgment in order for collateral estoppel to apply. Resp. br. at 27. However, when the criteria for applying collateral estoppel is examined, it is clear that the State should have been estopped from relitigating Senior Judge Anderson's ruling on the admissibility of the DNA evidence: 1) the issue in the present case is identical to the issue decided in the prior adjudication; 2) there was a judgment on the merits of Appellant's motion to preclude introduction of the DNA evidence based on the unreliability of the tests used; 3) the parties are the same; and 4) the State had a full and fair opportunity to litigate the issue in the prior suit. *State v. Nunley*, 923 S.W.2d 911, 922 (Mo.banc), *cert. denied*, 519 U.S. 1094 (1997).

Because Appellant's due process right to a fair trial was violated by an intentional act of the State, one employed solely to gain a tactical advantage over Appellant, this Court should reverse Mr. Keightley's convictions and discharge him from custody.

II.

The trial court erred in denying Appellant's motion for judgment of acquittal on Count II, statutory sodomy committed by Appellant placing his penis in the mouth of Dawn Zepeda, in accepting the jury's guilty verdict on that count and in sentencing Appellant on that count because there was insufficient evidence to prove his guilt beyond a reasonable doubt as required by the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Dawn Zepeda's testimony on that issue was so contradictory that it could not be relied on and without corroboration, leaves the mind clouded with doubt concerning Appellant's guilt of that offense.

Respondent argues that there was a single inconsistency in Dawn's testimony, and therefore corroboration was not necessary. Resp. br. at 34, *citing State v. Finney*, 906 S.W.2d 382 (Mo.App., S.D. 1995). In *Finney*, the Court found a single inconsistency is over twenty pages of direct and cross examination of the victim. *Id.* at 386. It also found that the victim's testimony was corroborated by the testimony of his mother and teacher that after he began going to Finney's apartment, his behavior changed. *Id.*

Appellant disagrees that there was a single inconsistency concerning whether Appellant ever placed his penis in Dawn's mouth. Dawn testified that Appellant began abusing her a month or two before he gave her mother a ring (Tr. 382). Sarah testified that she received the ring two days after Easter, (April 4,

1999) (Tr. 270). Dawn testified that the abuse occurred in Appellant's bedroom and in his truck (Tr. 380) and it would happen when Appellant would send Sarah and the boys into town for cigarettes (Tr. 381), Terry would drive on these trips (Tr. 381). Terry moved out of the trailer in April (Tr. 271). Sarah testified that Appellant began sending her out on errands with the boys after she received the ring (Tr. 274).

Dawn testified that Appellant had intercourse with her in the bedroom "once or twice" (Tr. 387) and "every other day" (Tr. 387). She testified that Appellant touched her while in his truck "whenever he would be taking me to my friend's house." (Tr. 389). "It happened a lot of times." (Tr. 390). Dawn's friend, Trisha Davis, testified that Dawn came to her home four or five times (Tr. 643), and that she would get there on the school bus (Tr. 644). Davis also testified that she would take Dawn home, and in her memory, Appellant picked Dawn up one time (Tr. 644).

While Appellant's Point Relied On and Argument focus on the important inconsistency in Dawn's testimony concerning Count II, oral sodomy, when Dawn's testimony is reviewed in its totality, it is clearly contradictory and when applied to the other facts adduced at trial, it is unconvincing. *State v. Kuzma*, 751 S.W.2d 54, 58 (Mo.App., W.D. 1987).

In discussing the corroboration rule, Respondent argues that "the rule does not apply to inconsistencies between the victim's trial testimony and the victim's out-of-court statements." Resp. br. at 34. In support of this proposition,

Respondent relies on *State v. Sprinkle*, 122 S.W.3d 652, 666 (Mo.App., W.D. 2003); *State v. Gatewood*, 965 S.W.2d 852, 856 (Mo.App., W.D. 1998); *State v. George*, 921 S.W.2d 638, 643 (Mo. App. S.D. 1996); *State v. Creason*, 847 S.W.2d 482 (Mo.App., W.D. 1993); and *State v. Patterson*, 806 S.W.2d 518, 519-20 (Mo.App., S.D. 1991). Appellant examined the history of those cases and found that there is no support for the proposition that the corroboration rule only applies to inconsistencies within the victim's trial testimony.

Sprinkle, *supra* cites *State v. Gatewood*, *supra*. *Gatewood* in turn cites *State v. Marlow*, 888 S.W.2d (Mo.App., W.D. 1994). *Marlow* involved an adult victim, and in support of its holding that the corroboration rule is triggered only by inconsistencies in the victim's in-court testimony, it cites *State v. Tomlin*, 864 S.W.2d 364 (Mo.App., E.D. 1993), and *Creason*, *supra*. *Tomlin*, *supra*, dealt with the "destructive contradiction rule," and involved an adult victim, 864 S.W.2d at 366. The *Tomlin* court stated:

Some cases have recognized a narrow exception to the general rule requiring corroboration of the victim's testimony when: 1) the defendant is charged with a sexual offense; 2) inconsistencies exist within the victim's *own statements*; and 4) the victim's testimony is rendered doubtful by gross inconsistencies and contradictions.

Id. (emphasis added).

There is nothing in *Tomlin* that supports the holding in *Marlow* that the corroboration rule is only triggered by inconsistencies within the statements made by the victim from the witness chair.

George, supra cites *State v. Sladek*, 835 S.W.2d 308 (Mo.banc 1992) and *State v. Gardner*, 849 S.W.2d 602 (Mo.App., S.D. 1993). *Sladek, supra*, cites *State v. Daniel*, 767 S.W.2d 592 (Mo.App., W.D. 1989), which cites no authority for the proposition that the corroboration rule is not triggered by inconsistencies between the victim's in-court and out-of court-statements, or the statements of other witnesses. *Gardner, supra*, relies on *Sladek* and *Daniel*, 849 S.W.2d at 604. The Court in *Creason, supra* does say that the corroboration rule is not triggered unless the inconsistencies arise in the victim's trial testimony. *Id.* 847 S.W.2d at 485, but in support of that statement, *Creason* cites *State v. Patterson*, 806 S.W.2d 520 (Mo.App., S.D. 1991). In *Patterson*, the Court compared the victim's in-court statements with those she made to the man who found her and the Sheriff, both made out-of-court. *Id.* at 520.

Since a child victim's out-of-court statements come into evidence if they are found to be reliable, Section 491.075, and any witness' out-of-court statements may come in as substantive evidence if they are inconsistent with the witness' in-court testimony, Section 491.074, it only makes sense to look for inconsistencies between the victim's in-court testimony, and her out-of-court statements as long as they are relevant to an element of the offense. *Patterson*, 806 S.W.2d at 520.

Therefore, in deciding whether or not Dawn's testimony was sufficient to sustain Appellant's conviction on Count II without corroboration, this Court should examine all of her statements, not just those made while on the witness stand, and it should view her statements in light of all of the evidence in the case to determine if it leaves the mind clouded with doubt. If that is done, this Court can only conclude that the victim's testimony concerning oral sodomy is so inconsistent that it failed to provide the jury with substantial evidence upon which to find Appellant guilty of statutory sodomy as charged in Count II.

This Court should reverse Appellant's conviction on Count II and discharge him from the sentence imposed on that Count.

III.

The trial court abused its discretion in granting the State’s Motion for Pretrial Ruling on the General Acceptance and Admissibility of PCR-STR DNA Testing Technology and Brief in Support Thereof and denying Appellant’s Motion to Determine Admissibility of Novel Scientific Evidence and Request for a *Frye* Hearing and in admitting the State’s DNA evidence without first holding an evidentiary hearing pursuant to *Frye* because those rulings denied Appellant’s right to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution in that the Appellant was denied the opportunity to prove that the new DNA technology, STR is not generally accepted in the scientific community because the primer sequence of the test kits used, Profiler Plus and COfiler, have not been released to the scientific community for peer review and verification of the validity of the method to produce reliable results.

Respondent states that the trial court found that a *Frye*¹ hearing was not necessary because an “overwhelming majority of jurisdiction” have found that the PCR-STR DNA testing techniques were generally accepted in the scientific community (L.F. 40). However, only Missouri appellate court has ever found PCR-STR DNA testing techniques generally acceptable after an evidentiary hearing. *State v. Faulkner*, 103 S.W.3d 346 (Mo.App., S.D. 2003).

If the trial court based its finding on the State's pleading, "State's Motion for a Pretrial Ruling on the General Acceptance and Admissibility of PCR-STR DNA Testing Technology and Brief in Support Thereof" (L.F. 12-39), there was no evidence to support that finding. Pleadings are not self-proving and an appellate court cannot accept counsel's statements as a substitute for record proof. *State v. Smith*, 944 S.W.2d 901, 921 (Mo.banc), *cert. denied* 522 U.S. 954 (1997).

Respondent outlines the trial testimony of Cary Maloney for the State and Dean Stetler for the defense. Resp. br. 37-39. What this proves is that there were material fact issues in dispute that could only be resolved by giving each party an opportunity to present its case in a *Frye* hearing.

Respondent asserts that "[t]he general scientific acceptability of DNA identification procedures is a matter of judicial notice. *State v. Huchting*, 927 S.W.2d 411, 417 (Mo.App., E.D. 1996). Respondent goes on to say that "this determination is typically made in a pretrial hearing, but there is no abuse of discretion in not holding a hearing where the evidence demonstrates that the procedure has gained general acceptance in the scientific community. Resp. br. at 39, *citing State v. Salmon*, 89 S.W.3d 540, 544-45 (Mo.App., W.D. 2002).

The problem with these assertions is that *Huchting*, *supra* relies on *State v. Ralph Davis*, 814 S.W.2d 593 (Mo.banc), *cert. denied* 502 U.S. 1047 (1992) and *State v. Daryl Davis*, 860 S.W.2d 369 (Mo.App., E.D. 1993). Both of those cases dealt with the general acceptability of the RFLP method of DNA testing, a method

¹ *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

the Missouri State Highway Patrol Lab stopped using in 1999 when it began using the PCR-STR method (Tr. 446). Maloney testified that the STR method is “relatively new” in the forensic field (Tr. 509).

Respondent asserts that “[t]he appellate courts of this State have held that PCR-STR DNA analysis is generally accepted in the forensic scientific community. Resp. br. at 40. Only two appellate courts have made that finding; *State v. Salmon, supra.* and *State v. State v. Faulkner*, 103 S.W.3d 346 (Mo.App., S.D. 2003). Appellant discusses the problems with the decisions in *State v. Salmon, supra* and *State v. Faulkner, supra*, in his original brief and will not repeat that argument here. See Appellant’s br. at 58-60.

Respondent argues that “because the primer kits do not involve a new or different manner of conducting the test, but are merely tools used in the generally-accepted STR process, they do not constitute a new scientific technique requiring a finding of general acceptance.” Resp. br. at 42.

But at trial, Maloney explained the process of DNA testing and noted that the FBI “settled on thirteen particular genetic markers that everyone must type in order to be a part of this system.” (Tr. 452). He went on to testify that “the area of that total DNA that we’re interested in is determined by the primers that we use in order to amplify the DNA for eventual typing. Those primers will set down in a specific area and only that area each time and will amplify or copy on the regions that we’re most interested in.” (Tr. 456). Thus, contrary to Respondent assertion,

the primers are an important component in the new scientific technique of PCR-STR DNA testing, and not merely “tools.”

As the Court in *Frye, supra* noted:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

293 F. at 1014.

The scientific discovery of DNA identification is well established. But the need to use marker kits in the PCR-STR technique of DNA identification makes the general acceptability and reliability of those markers an issue which each trial court must determine after giving both parties an opportunity to present evidence in support of its position.

Appellant submits that when he was given the opportunity to present evidence in a pretrial *Frye* hearing before Senior Judge Anderson, he was able to convince the court that the Profiler and COfiler markers have not yet crossed the line between the experimental and the demonstrable stages of scientific acceptability. He should have been given that same opportunity after the case

began anew. The trial court erred in refusing to allow him that opportunity, and this Court should reverse Appellant's conviction and remand his case for a new trial in which he will be given an opportunity to present evidence in a pretrial *Frye* hearing.

CONCLUSION

For the reasons stated in Point and Argument I in Appellant's substitute opening and reply briefs, this Court should reverse Appellant's convictions and discharge him from custody. For the reasons stated in Point and Argument II in Appellant's substitute opening and reply briefs, this Court should vacate his conviction on Count II and discharge him from his sentence on that count. For the reasons stated in Point and Argument III in Appellant's substitute opening and reply briefs, this Court should reverse his convictions and remand his case for a new trial, giving Appellant the opportunity to present evidence in a pretrial *Frye* hearing.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,298 words, which does not exceed the 15,500 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0, which was updated in August, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of August, 2004 to Richard Starnes, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Nancy A. McKerrow

